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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

MONICA MORA, Plaintiff and Appellant, v. DORETHA DAVIS,[1] Defendant and Respondent.	C050624 (Super. Ct. No. 01AS05096)

In this personal injury action arising from a car crash, plaintiff Monica Mora appeals from a jury verdict that found defendant Doretha Davis not negligent. On appeal, plaintiff contends (1) defendant's own testimony established she was negligent as a matter of law, and (2) the trial court erred prejudicially in allowing one of defendant's experts to testify and in limiting plaintiff's cross-examination of that expert.

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[1] Defendant was named in the complaint as "Doretha Jones"; however, at trial, she indicated that her name was now "Doretha Davis," and the jury was informed of that fact.

As we shall explain, plaintiff's appeal crashes on the well-worn review paths of substantial evidence and inadequate record. We shall affirm.

DISCUSSION

The car collision took place on August 29, 2000, in an intersection in a shopping center parking lot near the entrance to the lot. Defendant's van was hit from the right by a car; as a result, the van was directed into another car in which plaintiff was a passenger.

For her first contention on appeal, plaintiff argues that the only evidence concerning defendant's actions before entering the intersection was defendant's undisputed testimony, and that testimony showed defendant was negligent by failing to stop or slow and look to her right. Consequently, plaintiff maintains, the facts of defendant's negligence are undisputed and we must apply de novo the law of negligence to such facts, rather than employ the substantial evidence standard of review. In making this de novo application, plaintiff asserts, the jury's finding of no negligence cannot be sustained legally. (See *Wiley v. Easter* (1962) 203 Cal.App.2d 845, 856-858 (*Wiley*) [appellate court reversed jury defense verdict, finding that defendant's undisputed testimony established she did not look for other vehicles as she entered the intersection at issue].)

There are two problems, however, with plaintiff's approach.

The first is that defendant's testimony was not as clear-cut on the issue of her negligence as plaintiff would have us

believe. Defendant testified that she either stopped or almost stopped prior to entering the uncontrolled intersection, and that at the time of the collision she was traveling about five miles per hour. Furthermore, at a couple of points during her testimony, and in confusing contexts, defendant testified that the first time she looked to her right was when she was in the intersection. At several other points in her testimony, and in clearer contexts, defendant testified that she checked her surroundings before entering the intersection, looking in all directions (including to her right). (Compare *Wiley, supra,* 203 Cal.App.2d at pp. 856-857 ["Singularly, [defendant] did not testify that she looked to the right or left or straight ahead for other cars as she approached the intersection. . . . There was no obstruction to the view; so her own testimony leaves her violating one of the cardinal duties of a motorist who approaches an intersection."].)

In light of the nature of defendant's testimony, our approach to plaintiff's contention that defendant was negligent is not whether the law of negligence was applied correctly to undisputed facts. Instead, our approach is whether substantial evidence supports the jury's finding that defendant was not negligent. (See *Wahlgren v. Market Street Ry. Co.* (1901) 132 Cal. 656, 663-664.)

And that raises the second problem for plaintiff concerning her contention of defendant's negligence. Plaintiff has presented an appellate record that contains only defendant's testimony and that of the challenged defense expert. As the

parties acknowledge, plaintiff also testified, as did the driver of the car, Tanya Wormley, in which plaintiff was a passenger. According to defendant, plaintiff and Wormley testified regarding how the accident occurred, including defendant's "actions prior to and on entering the intersection." Defendant adds that plaintiff "was actually one of the best witnesses for the defense in terms of liability." Plaintiff counters that she and Wormley testified, as relevant here, only about "causation."

When an appellant challenges the sufficiency of the evidence, she must set forth "'*all* the material evidence on the point and *not merely* [her] *own evidence*.'" (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881, italics in original; accord, *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255.) "Failure to do so amounts to waiver of the alleged error and we may presume that the record contains evidence to sustain every finding of fact." (*Jordan, supra,* at p. 1255.)

Plaintiff tries to avoid this waiver principle by noting in her brief that she "cited only *Defendant's* evidence." (Italics in original.) But plaintiff is too clever by half. Plaintiff viewed defendant's testimony as *favorable to plaintiff's case.* Indeed, it was *plaintiff* who called defendant as her witness at trial. Plaintiff has therefore waived this substantial evidence contention. In any event, as we have seen, defendant's testimony supported the jury's finding of no negligence on her part.

In her second contention on appeal, plaintiff claims the trial court committed a series of errors in allowing defendant's biomechanical expert, Donald Macko, to testify. Plaintiff asserts that Macko had flouted the discovery rules, and that the trial court refused to allow plaintiff to cross-examine Macko regarding his accident reconstruction testimony. But even if we assume for the sake of argument that the trial court erred in these respects, plaintiff, given the abbreviated record she has provided on appeal, cannot show prejudice.

To show prejudice, plaintiff must show a miscarriage of justice. And "'a "miscarriage of justice" should be declared only when the court, "after an examination of the *entire* cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, italics added, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836.) We are unable to examine the *entire* cause here, including the evidence, because plaintiff has presented us with a truncated record as explained above. (Contrast *Wiley, supra,* 203 Cal.App.2d at pp. 847-848 [where appellate court granted rehearing to obtain a full record after finding erroneous the evidentiary admission of defendant's postaccident exculpatory statement to the police; the abbreviated record that plaintiff had presented on appeal showed defendant stood "'pretty well convicted of . . . negligence upon her own [trial] testimony,'" (*id.* at p. 847) and the court was unable on this abbreviated

record to determine if the evidentiary error had resulted in a miscarriage of justice]; here, by contrast, defendant did not convict herself of negligence, and contrary to what plaintiff says, Macko testified on plaintiff's lack of injury (based on the accident's forces) rather than on defendant's lack of liability (based on the accident's reconstruction)--the jury never reached the issue of injury, finding defendant not liable.)

In the end, it is an appellant's duty to provide an adequate record that demonstrates error and that enables the appellate court to review and correct it. (*Weiss v. Brentwood Sav. & Loan Assn.* (1970) 4 Cal.App.3d 738, 746.) Plaintiff has failed to do so regarding both her contentions here.

DISPOSITION

The judgment is affirmed.

DAVIS, Acting P.J.

We concur:

MORRISON, J.

HULL, J.